(2)

Supreme Court, U.S.
FILED
SEP 4 1987
JOSEPH F. SPANIOL, JR.

No. 87-49

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALASKA AIRLINES, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

12 pp.

TABLE OF AUTHORITIES

Cases:	Page
Alaska Airlines, Inc. v. *Donovan*, 594 F. Supp. 92 (D.D.C. 1984), rev'd, 766 F.2d 1550 (D.C. Cir. 1985), aff'd, No. 85-920 (Mar. 25, 1987)	2, 3, 7
Bowen v. *Owens*, 476 U.S. 340 (1986)	5-6
INS v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987)	8
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	5, 7
Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955)	6

Constitution, statutes and regulations:

U.S. Const. Amend. V	1, 6
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705	1
49 U.S.C. App. 1371(c)-(d)	2
49 U.S.C. App. 1482(d)	2
49 U.S.C. App. 1551(a)(1)(A)	2
49 U.S.C. App. 1551(a)(3)	2
49 U.S.C. App. 1552 (§ 43)	1, 2
49 U.S.C. App. 1552(a)-(c) (§ 43(a)-(c))	2
49 U.S.C. App. 1552(a)(1)	8
49 U.S.C. App. 1552(d) (§ 43(d))	2, 4, 6, 7
49 U.S.C. App. 1552(d)(1) (§ 43(d)(1))	2, 3
49 U.S.C. App. 1552(e) (§ 43(e))	2
49 U.S.C. App. 1552(f)(1) (§ 43(f)(1))	3
49 U.S.C. App. 1552(f)(3)	3
49 U.S.C. App. 1552(h) (§ 43(h))	2
29 C.F.R. Pt. 220	1, 3
Section 220.01(j)	5
Section 220.20(a)-(c)	6
Section 220.21	3
Section 220.21(a)(2)	7
Section 220.29	5

Miscellaneous:

50 Fed. Reg. 53093 (1985)	3
H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. (1978)	2
S. Rep. 95-631, 95th Cong., 2d Sess. (1978)	1, 2

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-49

ALASKA AIRLINES, INC., ET AL., PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners, 11 airlines certificated by the Civil Aeronautics Board (CAB) prior to the enactment of the Airline Deregulation Act of 1978 (the Deregulation Act), Pub. L. No. 95-504, 92 Stat. 1705, challenge the "duty to hire" provisions contained in the Act, 49 U.S.C. App. 1552, and the regulations promulgated thereunder, 29 C.F.R. Pt. 220. The duty to hire provisions generally require previously-regulated air carriers to give hiring preferences to certain employees who were terminated or furloughed within the ten-year period following October 24, 1978, the effective date of the Deregulation Act. Petitioners contend that the duty to hire provisions violate their Fifth Amendment rights to due process and equal protection.

1. In 1978, Congress decided that "[t]he time ha[d] come for a major change and fundamental redirection as to the manner of regulation of interstate and overseas air transportation so as to place primary emphasis on competition" (S. Rep. 95-631, 95th Cong., 2d Sess. 52 (1978)).

Enacting the Deregulation Act, Congress jettisoned the industry-wide fare structure previously enforced by the CAB and substantially altered the procedures by which airlines could enter new markets (49 U.S.C. App. 1371(c) and (d), 1482(d)). It also abolished the licensing power of the CAB as of 1981, and, effective in 1984, eliminated the CAB altogether (49 U.S.C. App. 1551(a)(1)(A) and (3)). See *Alaska Airlines, Inc.* v. *Brock,* No. 85-920 (Mar. 25, 1987), slip op. 1-2.

Congress determined, however, that airline deregulation should involve a "gradual and phased transition" (H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. 56 (1978)), and it expressed its resolve to "insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation * * * not [be] paid for by a minority—the airline employees and their families who have relied on the present system" (S. Rep. 95-631, *supra,* at 114). It therefore provided a statutory Employee Protection Program (EPP), enacted as Section 43 of the Deregulation Act (49 U.S.C. App. 1552), to assist dislocated employees.

The EPP as enacted had two parts. The first part, which has not been funded by Congress and thus has not become operative, see *Alaska Airlines,* slip op. 2-3, provides for monthly payments and relocation assistance to persons who had been employed by airlines for at least four years ("protected employees") and who lost their jobs or much of their income because of deregulation (§ 43(a)-(c), (e), and (h) of the Deregulation Act, 49 U.S.C. App. 1552(a)-(c), (e), and (h)). The second part of the EPP imposes on airlines certificated under the prior regulatory system "a duty to hire [protected employees] before they hire any other person" (§ 43(d)(1), 49 U.S.C. App. 1552(d)(1)). Under this provision, if any such "protected employee" is "furloughed or otherwise terminated" other than for cause within the ten years after October 24, 1978,

a carrier covered by the section is obligated to hire him, "in his occupational specialty," before it may hire any other job applicant to fill the position (except that the hiring carrier may first hire any of its own previously furloughed employees) (49 U.S.C. App. 1552(d)(1)).

2. Petitioners brought this action in the district court, initially challenging the constitutionality of the EPP's legislative veto provision, which provided an opportunity for Congressional review and disapproval of implementing regulations proposed by the Secretary (49 U.S.C. App. 1552(f)(3)).[1] Petitioners contended, moreover, that the balance of the EPP was inseverable from the veto provision and could not be sustained if the veto were struck down. The district court agreed with petitioners and invalidated the entire EPP. *Alaska Airlines, Inc.* v. *Donovan,* 594 F. Supp. 92 (D.D.C. 1984). The court of appeals reversed, finding the legislative veto to be severable, and remanded the case to the district court for consideration of petitioners' remaining challenges to the EPP and the regulations promulgated thereunder. *Alaska Airlines, Inc.* v. *Donovan,* 766 F.2d 1550 (D.C. Cir. 1985). This Court thereafter unanimously affirmed the decision of the court of appeals. *Alaska Airlines, Inc.* v. *Brock, supra.*

3. On remand from the court of appeals, the district court sustained all but one of the Secretary's regulations (Pet. App. 6a-18a).[2] Relying on the language and

---

[1] Section 43(f)(1) of the statute authorizes the Secretary to "issue, amend, and repeal such rules and regulations as may be necessary for the administration" of the EPP (49 U.S.C. App. 1552(f)(1)). Pursuant to that authority, the Secretary issued final regulations in 1983 and again in 1985. See 50 Fed. Reg. 53093 (1985) (codified at 29 C.F.R. Pt. 220).

[2] The sole exception was a portion of 29 C.F.R. 220.21 dealing with the initial hiring age of flight officers and pilots. The district court invalidated this provision and remanded for further explanation by the

legislative history of the EPP, the district court first rejected (*id.* at 8a-11a) the argument that the Secretary 's regulations were overbroad in that they covered employees who were terminated for reasons unrelated to the deregulation of the airlines. The court explained (*id.* at 11a-12a) that "[t]he duty to hire in § 43(d) [49 U.S.C. App. 1552(d)] is without qualification and there is no indication that Congress delegated any authority to the Department of Labor to limit eligibility or create a system to determine which terminations are due to deregulation." Moreover, the court held (*id.* at 12a) that the decision "to adopt a broad definition of the duty to hire" is not unconstitutional, even though it "may create a burden for the Airlines," since the evidence before Congress demonstrated that "there [i]s no way to determine which employees [are] victims of general business circumstances and which [are] victims of regulatory reform" (*ibid.* (footnote omitted)). Finally, the court rejected the claim (*id.* at 13a-14a) that the Secretary's regulations violate due process and equal protection because they impose the duty to hire only on airlines that were certificated by the CAB prior to the deregulation. The court observed (*ibid.* (citation omitted)) that "[a]t the time the Deregulation Act was passed Congress believed that regulated carriers had been the beneficiaries of a system which protected them from competition, resulting in more costly and less efficient service to consumers. Congress decided that the beneficiaries of regulation should bear the burden of displacements that might occur as a result of deregulation."[3]

Secretary. Pet. App. 15a-16a. The court of appeals subsequently reversed this judgment and sustained the regulation (*id.* at 4a).

[3] The district court also rejected several claims that the Secretary's regulations were inconsistent with petitioners' safety (Pet. App. 14a-17a) and equal employment opportunity obligations (*id.* at 17a-18a), and that the regulations "upset the delicate employer-

4. The court of appeals, in an unpublished memorandum, unanimously affirmed the decision of the district court, except as to two issues not presently before this Court (Pet. App. 1a-5a).[4] The court found the Secretary's regulations to be "clearly reasonable, consistent with the terms of the [Deregulation] Act, and within the Secretary's statutory authority" (*id.* at 3a). And rejecting petitioners' constitutional claims as "without merit" (*ibid.*), the court explained (*id.* at 3a-4a) that "Congress' decision to place certain of the burdens of airline deregulation solely on the previously-regulated carriers satisfies the standard of rationality that applies to economic regulation."

5. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

a. Petitioners recognize (Pet. 9) that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). See, *e.g.*, *Bowen* v. *Owens*,

---

employee 'balance' established by the Railway Labor Act" (*id.* at 18a). And the court found (*ibid.*) that "[t]he remaining objections in the Airlines' broadside attack are equally frivolous and must be rejected." Petitioners do not renew these objections in their petition.

[4] The court of appeals reversed the district court decision only to the extent that it had struck down a portion of the regulations that generally prohibit employers from using maximum hiring age criteria in implementing the duty to hire (Pet. App. 4a). The court of appeals also vacated and remanded a portion of the district court decision to allow the Secretary to clarify the scope of the equal employment opportunity exception to the duty to hire, embodied in 29 C.F.R. 220.29 and 220.01(j) (Pet. App. 5a). These issues are not presented in the petition.

476 U.S. 340 (1986); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). Petitioners contend (Pet. 9-16), nonetheless, that the duty to hire violates both the Takings Clause and equal protection component of the Fifth Amendment – first, because it is purportedly imposed "exclusively on companies with no previous relationship to the protected employee whatsoever" (*id.* at 13); and second, because it applies only to airlines that were certificated prior to the enactment of the Deregulation Act. Both claims are mistaken.

First, petitioners misstate the way in which the duty to hire operates. Section 43(d) does *not* impose the duty to hire only on airlines that had no connection to the protected employee. Petitioners base their contrary conclusion on the sentence in Section 43(d) (emphasis added) that provides that once a protected employee is furloughed or otherwise terminated, he "shall have a first right of hire * * * by any *other* air carrier [certificated before the enactment of the Deregulation Act]". But that Section also provides that "[e]ach such air carrier hiring additional employees shall have a duty to hire such a person [i.e., a protected employee] before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person." It is thus clear that the airline that placed the protected employee on furlough has a duty to hire him once it begins to hire additional employees. Indeed, the statute explicitly provides that an airline may give priority to the rehiring of its own protected furloughed employees.[5]

---

[5] Petitioners are also mistaken in suggesting (Pet. 11) that the duty to hire provision requires previously-certificated carriers to hire "less qualified and able" employees. The Secretary's regulations permit carriers to require that job applicants, including protected employees, meet standard qualifications set by the carriers and give the carriers discretion to choose from the pool of protected employees. 29 C.F.R. 220.20(a) and (c). Airlines may also require protected employees to

Petitioners' assertion that Section 43(d) "unfair[ly] discriminat[es]" (Pet. 14) between airlines certificated before and after the enactment of the Deregulation Act rests on no sounder footing. In the sphere of economic legislation, "the imposition of liability for effects of disabilities bred in the past [may be] justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor" (*Turner Elkhorn,* 428 U.S. at 18). In this case, as the lower courts observed (Pet. App. 3a-4a, 14a), the airlines that were certificated to do business before deregulation benefited from the prior system, and Congress could rationally conclude "that the beneficiaries of regulation should bear the burden of displacements that might occur as a result of deregulation" (*id.* at 14a).

b. Petitioners further challenge (Pet. 16-21) the constitutionality of the duty to hire provision because, in their view, it is not rationally related to "the *articulated* legislative purpose" (*id.* at 21) of the EPP of "provid[ing] protections for employees adversely affected by deregulation" (*id.* at 17). Petitioners contend that the duty to hire does not promote this legislative purpose principally (1) because the Secretary failed to implement the first part of the statute providing for monthly payments and relocation assistance, and thus "ignored" the mandate of Congress (*id.* at 18), and (2) because the duty to hire protects even employees whose dislocation was not the result of deregulation (*id.* at 19). However, the Secretary elected not to implement the payment provision only because Congress itself chose not to fund the scheme. Thus that portion of the EPP never became operative as a result of Congress' own choice. See *Alaska Airlines,* slip op. 3.

---

reveal the status of their seniority or recall rights when applying for jobs and may consider such rights in selecting from the protected pool. 29 C.F.R. 220.21(a)(2).

Further, there is nothing irrational about extending the duty to hire to employees whose termination was not apparently the product of deregulation. As the district court found (Pet. App. 12a), the difficulty of determining whether a given employee was, in fact, affected by deregulation justified Congress in formulating "a broad definition of the duty to hire"—extending that duty to include all protected employees who were furloughed or otherwise terminated, other than for cause, during the ten years following the enactment of the Deregulation Act.

c. Finally, petitioners contend (Pet. 23-27) that the Secretary's regulation extending the duty to hire to employees whose dislocation was not the result of deregulation is not "in harmony with the purpose of the authorizing legislation" (*id.* at 23). Petitioners do not dispute, however, that the language chosen by Congress to establish the duty to hire was intentionally broad. In marked contrast to the prerequisites for monthly assistance under the EPP, there is no clause in the duty to hire provision limiting coverage to those employees who were deprived of employment or compensation due to "a qualifying dislocation" (see 49 U.S.C. App. 1552(a)(1)). As the district court explained (Pet. App. 10a (footnote omitted)), petitioners "cannot ignore this difference in terminology or dismiss it as accident or mistake. Congress used different terms, separately and carefully defined to describe the employees eligible for these two programs. Only those who are seeking monetary assistance from the government are required to make the rigorous showing that deregulation was the cause of their termination. 'Protected employees' who cannot make this showing are still 'protected' by the duty to hire provision." See *INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), slip op. 8-10.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/60003